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Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, PGA TOUR, Inc.,[1] respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 204 F.3d 994. The opinions of the district court (Pet. App. 16a-40a, 41a-55a) are reported at 994 F. Supp. 1242 and 984 F. Supp. 1320.

[1] Petitioner, PGA TOUR, Inc., does not have any parent corporations, subsidiaries, or affiliates that have issued shares to the public.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 6, 2000. On May 17, 2000, Justice O'Connor extended the time to file a petition for a writ of certiorari to and including July 5, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth in the appendix to this petition at Pet. App. 56a-96a.

STATEMENT

This case raises the questions whether the "public accommodations" provisions of Title III of the Americans with Disabilities Act (the "ADA" or "the Act"), 42 U.S.C. § 12101 *et seq.*, extend to the competitors in a professional sports competition, and, if so, whether the Act requires waiver of a substantive rule of the competition so that a disabled person can compete. The district court held that Title III of the Act did apply and that Title III mandated waiver of a substantive rule unless it could be shown that the waiver would give the disabled competitor an unfair advantage over a hypothetical able-bodied competitor. The court of appeals affirmed.[2]

A. The issues in this case arise out of a challenge by respondent, a disabled professional golfer, to one of the competitive rules applicable to certain golf tournaments sponsored by PGA TOUR, Inc. (the "Tour")—specifically the so-called "walking rule," which requires golfers to walk the

[2] As we discuss later, the decision of the Ninth Circuit conflicts with a decision of the Seventh Circuit holding that waiver of a substantive competitive rule—indeed, the same rule at issue here—is not required by Title III. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000).

course during the competition. The tournaments, part of the PGA TOUR and the Buy.com TOUR (formerly the NIKE TOUR), test the ability of professional golfers to perform at the highest levels of golf competition.[3] Of the approximately 25 million golfers in the United States, only about 200 are eligible to play in PGA TOUR events each year, and only about an additional 170 are eligible to play in Buy.com TOUR events. Both PGA TOUR and Buy.com TOUR competitions are, by design, among the most difficult and challenging golf tournaments in the world.

The Tour carefully tailors its substantive rules to define the nature of its high-level competitions.[4] In addition to other rules specified by the "hard card," the Tour invokes several of the so-called "optional rules" from the Rules of Golf, which are explicitly intended to make competitions more exacting.[5] For example, the rules invoked by the Tour include the "one-ball rule," requiring competitors to use the same brand and type of

[3] PGA TOUR, Inc., a non-profit entity formed in 1968 to promote high-level golf competition and golf tournaments for its members, sponsors golf competitions for its members on three professional golf tours: the PGA TOUR, the Buy.com TOUR, and the SENIOR PGA TOUR. Respondent is not eligible to compete on the SENIOR PGA TOUR, which is limited to golfers age fifty and older, and this lawsuit involves only PGA TOUR and Buy.com TOUR (formerly NIKE TOUR) events. All references herein to "Tour events" and the like are to tournaments on those tours, not on the SENIOR TOUR.

[4] The rules governing Tour competitions come from three sources: (1) the Rules of Golf, as promulgated by the United States Golf Association ("USGA") and the Royal and Ancient Golf Club of St. Andrews, Scotland; (2) the Conditions of Competition and Local Rules (the so-called "hard card"), containing additional rules applicable specifically to all Tour events; and (3) the Notice to Competitors, containing certain tournament-specific rules.

[5] Among the rules prescribed by the "hard card" is a rule requiring competitors to use only "conforming" golf ball brands that satisfy objective USGA standards. This rule eliminates the competitive differences that would result if players used widely differing golf balls.

golf ball throughout a round. Taking account of the fact that different types of golf balls perform differently in wind and other conditions when struck by highly-skilled golfers, this rule makes the competition more demanding by preventing a competitor from, among other things, using one type of ball when hitting into the wind, and another type when hitting with the wind. The violation of any substantive rule results in a penalty or disqualification.

The Tour competitions—like every other elite golf competition in the world—require that players walk the golf course during tournaments.[6] This "walking rule," which has been part of Tour events from their inception, is specifically intended to add the element of stress and fatigue to the competition. During four days of competition, a golfer typically must walk twenty to twenty-five miles, often in heat, inclement weather, or over hilly terrain. The cumulative fatigue resulting from this requirement may, and frequently does, affect golfers' concentration, shot-making ability, and overall performance. The extent of such fatigue is impossible to quantify but will vary from golfer to golfer, depending upon factors like weather conditions, temperature, the terrain of the golf course, different golfers' psychological ability to cope with stress, the golfers' age and extent of physical conditioning, and so forth.[7]

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[6] The PGA TOUR "hard card" provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." The Buy.com TOUR "hard card" contains virtually identical language. The Rules Committee can permit players to ride only in those limited instances when, due to unusual course configuration or for safety reasons (*e.g.*, crossing streets), it is deemed appropriate to shuttle all players short distances during an event. The Rules Committee cannot permit, and never has permitted, a competitor to use a golf cart in the competition itself.

[7] The Tour also takes steps to make the course conditions for its events more adverse than usual. For example, the rough (the area beside the fairway) is grown longer than normal, pins are placed in more difficult positions on the greens, and tee boxes are moved back to maximize the distance on each hole. The Tour uses these and other measures to define the nature of its high-level competitions, distinguishing them from recreational golf and other less exacting competitions, including its own SENIOR TOUR.

The Tour has long maintained that, to ensure the integrity of its competitions and to maintain public confidence, all competitors must observe the substantive rules established for a particular tournament. As a result, the golfers participating in Tour events are required to compete under the same conditions. No competitor is given an allowance or advantage because of differences in strength or other physical characteristics. Tournament officials monitor each Tour event, and players themselves are obligated to report any violation of the rules.

B. Respondent Casey Martin is a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome, a congenital vascular condition that precludes blood from properly re-circulating up his right leg. This condition interferes with his ability to walk, and causes him pain. Respondent thus has difficulty in walking the required distances in professional golf tournaments sponsored by the Tour.

In 1997, respondent entered the Tour's National Qualifying Tournament, which is used to select members for the NIKE TOUR (now the Buy.com TOUR) and PGA TOUR. At the final stage, during which the "walking rule" is invoked, respondent sought permission to use a golf cart. The Tour, in accordance with its rules, denied the request. Respondent then filed this action, under 28 U.S.C. § 1331, seeking a preliminary and permanent injunction against enforcement of the "walking rule" in the Qualifying Tournament and in subsequent Tour competitions for which he qualified.

Respondent alleged that the refusal of the Tour to waive the "walking rule" violated both Title I and Title III of the Act. His "Employment Discrimination" claim under Title I asserted that he was a "qualified individual with a disability," Excerpts of Record, C.A. 9 at 17; 42 U.S.C. § 12111(8),[8] and that the Tour

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[8] Section 12111(8) reads: "The term 'qualified individual with a disability' means an individual with a disability who, with or without

had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions, and privileges of employment . . . ." Excerpts of Record, C.A. 9, at 17; 42 U.S.C. § 12112(a).[9] His "Public Accommodation Discrimination" claim under Title III alleged, among other things, that the Tour had failed to "provide [respondent] with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others in the PGA Qualifying Tournament, the NIKE TOUR or the PGA TOUR events." Excerpts of Record, C.A. 9, at 11. *See* 42 U.S.C. § 12182(a).[10] Respondent further stated that "[b]ecause of [his] disability, [he] cannot effectively compete in the PGA Qualifying Tournament, the NIKE TOUR or the PGA TOUR events or obtain compensation, benefits, privileges or advantages from the Qualifying Tournament, the NIKE TOUR o[r] the PGA TOUR events unless he is permitted

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reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

[9] Section 12112(a) reads: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

[10] Section 12182(a) reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Respondent also sought relief under 42 U.S.C. §12189, claiming that the NIKE TOUR was a course or examination related to professional credentialing and that the "walking rule" constituted discrimination in this examination.

to use a golf cart in the PGA Qualifying Tournament, the NIKE TOUR and the PGA TOUR events." Excerpts of Record, C.A. 9, at 11.

The district court rejected the Title I claim, finding that respondent was an independent contractor, not an employee of the Tour, and thus not covered by Title I. Pet. App. 25a. The court held, however, that Title III required a waiver of the "walking rule." In reaching this conclusion, the district court first resolved the threshold issue whether Title III, which addresses the provision of goods and services at "places of public accommodation," applies to *competitors* in a sporting event viewed by the public, determining that Title III extends not just to "those areas actually accessed by the public at large," Pet. App. 52a, but to the "playing area" as well. Pet. App. 53a. Based on that theory, the court concluded that Title III required organizations operating places of public accommodation to modify their policies for persons competing within the playing area, as well as for spectators and other attendees at the event. Pet. App. 54a-55a.

The district court further held that a waiver of the "walking rule" for respondent would not "fundamentally alter" the nature of Tour events. *See* 42 U.S.C. § 12182(b)(2)(A)(ii).[11] The court acknowledged that the "walking rule" is a substantive rule of Tour events, not a mere rule of style or tradition, expressly finding that it is intended to affect those competitions by "inject[ing] the element of fatigue into the skill of shot-making." Pet. App. 32a-33a. Notwithstanding that finding, however, the court agreed that it was proper to make "an

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[11] Section 12182(b)(2)(A)(ii) defines as discrimination: "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations" (emphasis added).

individualized inquiry into the necessity of the walking rule *in Casey Martin's case . . . ,*" Pet. App. 29a (emphasis added), asking whether his use of a golf cart would give him an unfair competitive advantage. After stating that, for an able-bodied competitor, "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances," Pet. App. 33a, the district court concluded that, because of his disability, the "fatigue [Martin] endures . . . is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." Pet. App. 35a. The court thus decided that the purpose of the "walking rule"—to subject competitors to the added element of stress and fatigue—was satisfied with respect to respondent by virtue of his disability, and it enjoined the Tour from requiring him to comply with the rule.

C. The Ninth Circuit affirmed. Like the district court, it first declined to draw a distinction, for purposes of applying Title III, between competitors within the playing area of a golf course and spectators in areas open to the general public. Noting that "golf courses are public accommodations," Pet. App. 4a (citing 42 U.S.C. § 12181(7)(L)), the court of appeals found no reason to "compartmentalize golf courses during tournaments" (Pet. App. 6a) by treating players competing for prize money "inside the ropes" differently from persons enjoying the tournament "outside the ropes." Dismissing arguments to the contrary, the court declared pointedly that there was no "justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living." Pet. App. 8a.

The Ninth Circuit then held that a waiver of the "walking rule" for respondent would not impermissibly transform Tour competitions. Although the Ninth Circuit did not question that the "walking rule" was a valid substantive rule, Pet. App. 9a-10a, it rejected the argument that waiver of any substantive rule—by destroying the uniformity of rules for all competitors—fundamentally alters the nature of a high-level

athletic competition. Rather, the court of appeals made an "individualized determination" (Pet. App. 14a) to assess whether a waiver for respondent, but not other competitors, would give him an "unfair advantage." Pet. App. 13a; *see also* Pet. App. 12a ("[t]he issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so"). Pointing to the district-court finding that the fatigue caused by walking during a golf tournament "cannot be deemed significant under normal circumstances," Pet. App. 10a (internal quotation marks omitted), the Ninth Circuit agreed that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." Pet. App. 15a.[12]

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit in this case—a decision that is squarely contrary to a decision of the Seventh Circuit on essentially the same facts (*see Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000))—presents two important questions regarding application of the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*): *first*, whether Title III of the Act regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation; and, *second*, whether, if so, Title III compels professional sports organizations to grant selective waivers of their substantive rules in order to accommodate disabled competitors. The Ninth Circuit held that the provisions of Title III are intended to govern, not just the enjoyment of goods and services by persons attending Tour events, but also the requirements set for golfers earning their living as part of the events themselves. Pet. App. 4a-8a. The

[12] The Ninth Circuit did not address respondent's alternative arguments, rejected by the district court, that respondent was an employee of the Tour covered by Title I and that the NIKE TOUR competitions were a "course or examination" under Title III. Pet. App. 15a n.10.

court then barred the Tour from applying its competitive rules uniformly to disabled and non-disabled golfers, holding that it must grant waivers to disabled competitors so long as they would not gain an unfair advantage. Pet. App. 8a-15a. Both of these rulings warrant review by this Court.[13]

The threshold question—whether Title III applies to standards for professional golfers competing at places of public accommodation—is an issue of enormous potential consequence. Although Title III clearly prohibits discrimination against persons seeking to patronize places of public accommodation, it is a considerable expansion of Title III to say that it is also meant to regulate job requirements for persons, like respondent, engaged in producing goods and services for the public. Not only are such persons often operating within areas closed to the public at large, but, in addition, Title I of the Act (the "Employment" title) has generally been regarded as the primary, if not exclusive, section of the Act dealing with possible discrimination against individuals in the private workplace. *See, e.g., Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *see also* H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House Report) ("employment practices are governed by Title I of this legislation"). While Title I provides broad, far-reaching protections for disabled workers, those protections are granted within specified limits: as it did in other leading civil rights statutes, *see, e.g.*, 42 U.S.C. § 2000e-2000e-17 (West 1994 & Supp 1998) (Title VII of the Civil Rights Act of 1964),

[13] This Court, in recent years, has frequently granted review to address important issues regarding construction and application of the Americans with Disabilities Act. *See Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998). *See also Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000) (No. 99-1240).

Congress extended protection only to certain workers (most particularly, employees and not independent contractors) and imposed obligations only on certain "covered" employers (most particularly, businesses with at least 15 employees). *See Birchem v. Knights of Columbus*, 116 F.3d 310, 312 (8th Cir. 1997) (ADA does not apply to independent contractors). By deciding that Title III (the "Public Accommodations" title) regulates job-related requirements at places of public accommodation, the Ninth Circuit has suddenly turned Title III into a full-blown extension of Title I, opening the door to workplace discrimination suits by non-employees (like respondent, who is an independent contractor) and suits against businesses with just a few employees (provided only that they fit within the broad definition of "public accommodation"). Even more strikingly, it has done so even though there appears to be not one word in the text of Title III, or the pertinent legislative history, to suggest that Congress had any such intent. This sweeping holding itself calls out for further review.

The second issue—whether (if applicable) Title III requires professional sports organizations to waive their substantive competitive rules for disabled competitors—is likewise serious and important.[14] So far as we are aware, no court has ever before held that a professional sport must waive a legitimate competitive rule to enable a would-be participant, disabled or not, to more successfully compete. Indeed, on the day following the decision below, the Seventh Circuit held, in a case with basically identical facts, that the United States Golf Association did not have to grant waivers of its "walking rule" (the same rule at issue here) for disabled professional golfers.

[14] As the term has been used in this litigation, a substantive rule is a rule that is intended to, and potentially does, affect the outcome of a particular competitive event. The term is used to distinguish those rules from various rules that are not intended to affect the outcome—for example, rules of dress or decorum—which, unlike the "walking rule," could be waived for all competitors without altering the basic nature of the competition.

See Olinger v. United States Golf Ass'n, supra. Unlike the Ninth Circuit, the Seventh Circuit recognized that selective waivers of a competitive rule are inconsistent with the fundamental principle, essential to high-level athletic competition, that participants must play according to the same set of rules, so that differences in physical performance may be accurately measured and rewarded. *See Olinger*, 205 F.3d at 1006. Also, again unlike the Ninth Circuit, the Seventh Circuit specifically declined to simulate the results of genuine competition by engaging in a hypothetical "individualized determination" to estimate whether a competitor exempt from a rule would have a competitive advantage over competitors subject to the rule. The very nature of that inquiry—substituting hypothesis for verifiable results—is contrary to the premise of high-level competitive athletics: that actual performance, under uniform rules, determines who does and does not have a competitive advantage.

The decision below bars the Tour from requiring that all competitors at its events play by the same rules. By contrast, as a result of the holding in *Olinger*, the United States Golf Association has the continuing right to establish and enforce its rules, including the "walking rule," for all golfers equally.[15] There is no rational reason for this difference. While we believe that the Seventh Circuit is correct, and the Ninth Circuit mistaken, the question whether professional sports organizations must change their competitive rules to accommodate disabled athletes is, in any event, a question of considerable significance. Review by this Court is necessary to provide authoritative guidance.

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[15] That right is now open to question, however. A recent lower-court decision enjoined the United States Golf Association from applying its "walking rule" to a disabled competitor. *See Jones v. United States Golf Ass'n*, No. OOCA278JN (United States District Court for the Western District of Texas) (June 14, 2000).

1. The first problem with the decision below is its erroneous, and potentially momentous, determination that Title III of the Act was meant to govern the terms and conditions set for professional golfers competing at places of public accommodation.[16] This holding not only stretches Title III beyond its intended boundaries but also upsets much of the legislative balance reflected in the broad, but not unlimited, reach of Title I.

Although the Ninth Circuit correctly observed that "golf courses are public accommodations," Pet. App. 4a, that observation is the beginning, not the end, of the relevant inquiry regarding application of Title III to this case. As the record makes plain (*see* Excerpts of Record, C.A. 9, at 10-12, 16-18), respondent does not claim that discrimination prevents him from equal enjoyment of the golf courses operated by the Tour for purposes of "exercise or recreation," 42 U.S.C. § 12181(7)(L), or from full and equal access to those courses as a spectator at public Tour events. Respondent makes a very different claim: that the refusal of the Tour to waive its rule requiring all competitors to walk the course prevents him from earning a living as a member of the Tour.[17] The question, then, is whether, even accepting the fact that golf courses are generally regarded as public accommodations, Title III dictates the terms and conditions of the Tour *competitions* held at those courses. The Ninth Circuit concluded that it does. Refusing to draw a distinction between spectators at a golf course and golfers in a tournament that they are watching, the court of

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[16] The Seventh Circuit in *Olinger* discussed, but ultimately did not resolve, the question whether Title III applies at all to the part of the golf course on which the competitors play. *See* 205 F.3d at 1004-05. It found that, in any event, the use of a cart by some competitors would "fundamentally alter the nature of the competition." *Id.* at 1005.

[17] In his complaint, respondent made essentially the same claim under both Title I and Title III of the Act. Relief was denied under Title I but granted under Title III. *See* pages 5-8 *supra*.

appeals held that, for purposes of applying Title III, there is no difference "between use of a place of public accommodation for pleasure and use in the pursuit of a living." Pet. App. 8a.

This holding, at a minimum, requires an awkward reading of Title III. By treating the viewing areas and playing fields of a professional sport as largely fungible, the Ninth Circuit has blurred, even obliterated, the line separating those *enjoying* the goods and services of a public accommodation from those *providing* the goods and services. Although a public accommodation is, by its very nature, open to the public in some respects, many places of public accommodation are made up of areas that are fully open to patrons and attendees and other areas that are principally reserved for persons working there. (Here, for example, the competitors "inside the ropes," like respondent, are competing for prize money as part of the entertainment viewed by members of the general public "outside the ropes." *See* Pet. App. 46a).[18] The provisions of Title III, however, principally aim at prohibiting discrimination with respect to persons seeking "full and equal enjoyment" of goods and services, 42 U.S.C. § 12182(a)—language that does not readily incorporate persons engaged in producing the goods and services. *See* House Report, pt. 2, at 100 ("people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities"). *See also* pages 16-17 *infra*. The decision by the Ninth Circuit thus contradicts the most natural reading of Title III itself.

The decision to apply Title III to competitors in a professional tournament also wreaks havoc with the overall

[18] For these purposes it makes no difference whether the golf courses are regarded as public accommodations because they are places of exercise or recreation or because they are places of exhibition or entertainment. *See* Pet. App. 5a. In either case, the golfers are part of the entertainment that the public comes to see. *See also* 28 C.F.R. Ch. I, pt. 36, app. B, at 623-24.

structure of the Act. As the text and legislative history of the Act demonstrate, it is Title I, not Title III, that addresses possible work-related discrimination, including the failure of business organizations to make reasonable changes in work requirements. The fact that respondent is not covered by Title I—his Title I claim was correctly rejected because he is an independent contractor, not an employee (Pet. App. 25a)—does not mean, as the Ninth Circuit apparently assumed, that he is merely remitted to obtaining relief under Title III: it means that the Act as a whole simply does not address possible private workplace discrimination against independent contractors. In that regard, the Act is no different from other federal civil rights laws, which make the same distinction. *See, e.g., Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491-92 (7th Cir. 1996) (independent contractors not protected by Title VII of Civil Rights Act); *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.*, 713 F.2d 32, 35-38 (3d Cir. 1983) (independent contractors not protected by Age Discrimination in Employment Act). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-27 (1992).

It is thus a serious error for the Ninth Circuit to read into Title III what Congress, dealing directly with the subject, quite deliberately left out of Title I. The text of Title I squarely and extensively addresses the subject of discrimination in the workplace, prohibiting discrimination against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "qualified individual with a disability" is itself defined in job-related terms, *i.e.*, whether the disabled person can, with or without accommodation, "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). This emphasis on work-related matters is then carried forth throughout the specific anti-discrimination

provisions of Title I, which commonly and repeatedly speak in terms of "job applicant[s] and employee[s]" (*id.*at § 12112(b)(1)), "equal jobs and benefits" (*id.* at § 12112(b)(4)), "employment opportunities" (*id.* at § 12112(b)(5)(B)), "job-related" standards or criteria (*id.* at § 12112(b)(6)), and the like. For all their breadth, however, these provisions generally protect only "employees" (or prospective employees) and place obligations only on "covered employers." *See id.* at § 12111-12112. *See also Birchem v. Knights of Columbus, supra.*

The provisions of Title III are addressed to a very different subject: the equal enjoyment of goods and services by members of the public. *See generally* 42 U.S.C. §§ 12181-12189. Nowhere in its operative or definitional sections is there any mention of jobs or workers, much less the enumeration of specific standards to address possible discrimination with regard to work-related terms, conditions, or privileges. The focus of the anti-discrimination provisions of Title III is on prohibiting discrimination in the *marketplace*—that is, discrimination denying full enjoyment of goods and services offered by places of public accommodation—not discrimination in the *workplace*. *See generally* 42 U.S.C. § 12182(a) (General Rule), § 12182(b)(1) (General Prohibition), § 12182(b)(2) (Specific Prohibitions). Thus, even though an organization operates a place of public accommodation (like a golf course or a restaurant), it does not follow that Title III can be stretched to regulate the job-related standards for workers helping to provide its goods or services to the public. Not only is that intention absent from Title III as a whole, but it is inconsistent with the reasonable inferences to be drawn from more specific subsections suggesting that Title III is aimed at "clients or customers" at places of public accommodation. *See* 42 U.S.C. §12182(b)(1)(A)(iv) ("For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered

public accommodation that enters into the contractual, licensing or other arrangement").[19]

The legislative history of the Act, insofar as it may be relevant, is to the same effect. Most notable is language in the House Report, which states, in the plainest terms, that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." House Report, pt. 2, at 99. In keeping with this straightforward assertion, the analysis of Title I in the House Report is, like the text of Title I itself, replete with discussion about what does, and does not, constitute discrimination in the workplace. *See* House Report, pt. 2, at 54-83, pt. 3, at 31-49. By contrast, the analysis of Title III, like the text of Title III, contains no discussion whatsoever of discrimination with respect to job terms and conditions, instead addressing the ability of the public (*i.e.*, clients or customers) to gain full and equal enjoyment of the goods and services provided by places of public accommodation. *See* House Report, pt. 2, at 99-129, pt. 3, at 53-69.[20]

The Ninth Circuit nevertheless held that Title III applies equally to persons in work areas and to persons in areas

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[19] The Tour has agreed that Title III requires reasonable accommodations for disabled patrons at a golf tournament, but it has repeatedly maintained that Title III does not impose similar requirements with respect to competitors playing in the tournament. As noted in the text, the Ninth Circuit held that Title III applied to spectators and competitors alike.

[20] The House Report does indicate that new construction and alterations to existing facilities generally should make both work and public areas accessible to disabled persons at public accommodations and "commercial facilities." *See* House Report, pt. 2, at 116-21, pt. 3, at 62-66; 42 U.S.C. § 12183. The Report makes clear, however, that this provision is not meant to convert Title III into a demi-version of Title I, imposing a supplemental set of job standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.*

generally open to the public. But this reading makes little sense. Why would Congress have deliberately limited coverage in Title I of the Act only to expand it dramatically—and with no mention of doing so—in Title III? And, if Congress had wanted to extend the protections of the Act to independent contractors, and to workers at businesses with only a small number of employees, why would it take that step—again, without any discussion—only for places of public accommodation? It seems far more likely that, if this broadened coverage were what it had in mind, Congress would have addressed the matter openly in Title I, thereby assuring that any allegations of discrimination in the private workplace were analyzed according to consistent, and job-specific, standards. The decision not to do so should be given effect, not nullified by a misreading of provisions aimed at a different problem.[21]

The potential consequences of applying Title III to job-related requirements for persons working at places of public accommodation are truly far-ranging. The definition of a "public accommodation" includes, among other things, most places of lodging, restaurants, retail establishments (grocery stores, hardware stores), service establishments (dry cleaners, lawyers' offices, pharmacies, doctors' offices), schools (from nursery through postgraduate), day-care centers, and bowling alleys, *see* 42 U.S.C. § 12181(7)(A)-(L)—many of which, it may be assumed, have only a small number of employees and

[21] The effort to apply other titles of the Act to workplace discrimination is not limited to this case. There is a split among federal courts of appeals regarding whether *Title II* (the "Public Services" title) applies to the terms and conditions of employment for government workers. *Compare Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999), petition for certiorari (No. 99-243) filed August 10, 1999, with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998); *Holmes v. Texas A & M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Doe v. Univ. of Maryland Med. Sys.*, 50 F.3d 1261 (4th Cir. 1995). Because the wording and legislative history of Title II and Title III are somewhat different, the questions posed by those cases are similar, but not identical, to the questions presented here.

utilize, at least on occasion, independent contractors to provide goods and services to the public. Pursuant to the decision below, it now appears that hiring or other job-related decisions at each of those establishments is subject to challenge under the Act, just like the decisions of employers that Congress deliberately made subject to coverage under Title I. *See also Menkowitz v. Pottsdown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998) (applying Title III to independent contractor), *cited with approval* at Pet. App. 6a; *see also id.* at 125-28 (Scirica, J., dissenting). Indeed, workers (or potential workers) bringing claims under Title III would actually be in a *preferred* position because they would not have to comply with the procedural requirements of Title I, including the directive to file a timely charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 12117(a) (incorporating charge requirement for claims of discrimination under Title I). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (rejecting expansive reading of 42 U.S.C. § 1981 in part because it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims").

There is no justification for this judicial restructuring of the Act. While Congress indisputably sought to expand employment opportunities for disabled individuals, it did so in a specific way, identifying the businesses and workers that it intended to make subject to the Act. By its refusal to distinguish between consumers and providers of goods and services, the Ninth Circuit read these limitations out of the Act, making Title III a backstop for claims of workplace discrimination not covered by Title I. This unwarranted expansion of the Act merits review by this Court.

2. The second holding of the Ninth Circuit—that Title III requires professional sports organizations to grant waivers of their substantive rules of competition to accommodate disabled competitors—is also of genuine importance. Rejecting the argument that forced waivers in and of themselves would

"fundamentally alter" the nature of high-level athletic competitions, Pet. App. 11a, 42 U.S.C. § 12182(b)(2)(A)(ii), the Ninth Circuit chose instead to make an "individualized determination," Pet. App. 14a, asking whether a waiver of a particular rule for a particular competitor would give him an "unfair advantage." Pet. App. 13a. Relying on the dissent in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 932 (8th Cir. 1994) (R. Arnold, C.J., dissenting), which dealt with age limits for high-school athletes, the court of appeals reasoned that, if no advantage is conferred, the waiver does not fundamentally alter the particular competition. *See* Pet. App. 10a-15a. The court found no reason for concern here, determining that the fatigue incurred by respondent even with a cart meant that he would not gain "an unfair advantage over his competitors." Pet. App. 15a.

This decision stands in direct contrast to a decision of the Seventh Circuit, handed down the very next day, that came to just the opposite conclusion. *See Olinger v. United States Golf Ass'n, supra*. Relying on the majority opinion in *Pottgen*, rather than the dissent, the Seventh Circuit recognized that "the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." 205 F.3d at 1005. Applying that standard, the court of appeals declined to examine the "personal circumstances" of the disabled golfer in that case (205 F.3d at 1005)—that is, *declined* to make an "individualized determination"—noting instead the importance of "a uniform set of rules for all golfers." *See* 205 F.3d at 1006. The Seventh Circuit quoted with approval from the opinion of the district court, stating that "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." 205 F.3d at 1006 (internal quotation marks omitted). It then upheld uniform application of

exactly the same rule that the Ninth Circuit had required the Tour to waive for respondent.[22]

The issue at the core of these contradictory holdings is whether high-level professional sports can require all competitors, disabled or not, to perform according to a uniform set of substantive rules. The Ninth Circuit (like the Seventh Circuit) acknowledged that the "walking rule" is a *bona fide* substantive rule (Pet. App. 9a-10a)—though not, in its view, an especially important one "under normal circumstances" (Pet. App. 10a)—but that court (unlike the Seventh Circuit) went on to conclude that waiver of a substantive rule does not "fundamentally alter the competition" as long as the disabled competitor would not gain an unfair advantage. *See* Pet. App. 10a-15a. This attempt at judicial "balancing," however, misses the essential point. The question is not whether, on a hypothetical basis, a waiver would or would not skew the results of a particular competition, but whether the waiver, by establishing different rules for different players, would *fundamentally alter the nature* of that competition. *See* 42 U.S.C. § 12182(b)(2)(A)(ii); *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979). On that point the Seventh Circuit understood what the Ninth Circuit did not: that the nature of demanding, high-level athletic competition requires that competitors be tested under the same rules.[23] A particular

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[22] Petitions for rehearing and rehearing *en banc* in *Olinger* were denied on June 22, 2000.

[23] Although the Ninth Circuit apparently thought otherwise, Pet. App. 12a, the right to conduct competitions according to uniform substantive rules cannot turn on whether a particular rule, looked at in isolation, is deemed "fundamental to the competition." First of all, the Ninth Circuit does not (and, we think, could not) explain how to tell a "fundamental" substantive rule from a "non-fundamental" one, an inquiry that is inevitably standardless and subjective. Second, the distinction—even if there were one—is immaterial: *all* substantive rules, by definition (*see* note 14 *supra*), are meant to, and do, potentially affect the outcome of the competition, and, therefore, to assure a fair and equal test, all competitors must abide by all of them.

set of rules may, of course, put some competitors at a physical disadvantage, but that fact simply reflects the difficulties faced, to a greater or lesser degree, by all competitors in top-level athletic events. Those events, by their very nature, are intended to measure differences in physical performance.[24]

The Seventh Circuit thus was quite right to reject the idea of a hypothetical "individualized determination" in order to estimate whether a certain competitor, if exempt from a particular rule, might obtain an unfair advantage. Even if the concept were sound in theory, there is, as a practical matter, simply no reliable or consistent way to make that calculation. Given the almost infinite variety of physical attributes that make up individual athletes, the task of conducting an imaginary contest between one competitor and another, with each performing under different substantive rules, is beyond the capacity of even the most conscientious arbiter. Furthermore, this hypothetical contest, however well-conducted, is itself incompatible with the true nature of athletic competition: to compare *actual* (and necessarily unequal) results according to uniform rules. That test cannot be replicated in administrative or judicial proceedings.[25]

The problem is amply demonstrated in this case. While no one questions respondent's determination, it is simply guesswork whether his use of a cart gives him an advantage

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[24] These differences can be quite small. In 1998, for example, the difference in average score between the number one and number 100 PGA TOUR scoring leaders was 2.32 strokes per round. Reporter's Transcript at 780-81.

[25] Although the problem of inequality presumably could be avoided by eliminating a particular rule entirely, even the Ninth Circuit did not question that total elimination of the "walking rule" would fundamentally change the nature of the Tour events in which respondent seeks to participate. The requirement that competitors walk the course has been an integral part of the highest-level golf competitions from their beginning.

over other competitors at a Tour event. It would be hard enough to divine an answer to that question if all other golfers conformed to a single physical profile (for example, the "able-bodied competitor" posited by the courts below), but, in fact, different golfers are affected quite differently by the demands of walking a golf course during four or more rounds of a professional tournament. Even assuming that some fit, injury-free golfers might prefer to walk the course at all times—and would do so if the "walking rule" did not exist—other golfers at a Tour event may suffer from debilitating conditions (bad backs, sore knees and ankles, arthritic joints) that are made significantly worse by extensive walking. While these conditions are not disabling (as the term is defined in the Act), they may force golfers out of tournaments entirely or, at the very least, significantly increase the fatigue associated with walking the course. Does a player like respondent, who has a more serious condition but also a waiver from the "walking rule," have a competitive advantage over each of those players? In our view, it is simply not possible to know. Even if a court made a comparison with each golfer at each tournament on a case-by-case basis, there is no reason to be confident that the answers, whatever they were, would be correct.

We recognize that the proper interplay between the Act and competitive athletics is an issue that provokes differing views.[26] On the one hand, it is part and parcel of high-level competitive athletics that all competitors observe, and abide by, a uniform set of rules; on the other hand, it is endemic to the Act that

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[26] In addition to the division between the Seventh and Ninth Circuits on the issue presented here, various federal courts of appeals have grappled with the related, though not identical, question whether the Act compels waivers of various high-school athletic eligibility rules, ultimately reaching divergent conclusions on that question as well. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999); *Pottgen v. Missouri State High Sch. Activities Ass'n, supra.*

institutions may be called upon to change policies in order to accommodate disabled persons. But Congress was well aware that the broad goals of the Act would sometimes conflict with other important interests—*i.e.*, that there would be circumstances in which a proposed modification to some policy would "fundamentally alter" the nature of a particular good or service. For those cases, Congress specifically set forth how the conflict should be resolved: by its express terms, *see* 42 U.S.C. § 12182(b)(2)(A)(ii), the Act does *not* require the organization to make a fundamental change in the nature of its business. That principle is controlling here. It is essential to the nature of high-level Tour events that all competitors, without exception, play by the same rules, and the Ninth Circuit simply failed to grant that interest its proper statutory weight.

It is, to our knowledge, unprecedented for a federal court to order that a professional athlete be allowed to compete without adhering to the full set of substantive rules applicable to other competitors. Given the novelty and significance of this mandate, we believe it appropriate for this Court to grant certiorari in order to decide whether the Act does or does not impose that obligation on professional sports organizations. *See, e.g., National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (deciding issue of importance to administration of intercollegiate athletics); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (same). The USGA and PGA TOUR, Inc., both of which operate nationwide,[27] sponsor most

[27] As a result of their nationwide presence, both organizations will be subject to suit in courts throughout the country, in addition to courts within the Seventh and Ninth Circuits. *See, e.g.*, note 15 *supra*. Until the issue is finally resolved, therefore, it appears likely that the question whether a disabled competitor is entitled to waiver of a substantive rule, or whether the Tour and USGA can apply their rules without exception, will continue to be decided on a "sometimes-yes, sometimes-no" basis, depending on the particular court. As the conflicting decisions of the Seventh and Ninth Circuits demonstrate, this system seems to serve neither the golfing organizations nor the individual golfers very well.

of the high-level men's professional golf tournaments in the United States, and it is important to them, to the golfers that compete in their tournaments, and to organizers and participants in other professional sports, to know whether the Act requires waivers of their substantive rules. We ask that this Court grant review to provide an authoritative answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 98-35309, 98-35509.

CASEY MARTIN,
Plaintiff-Appellee,

v.

PGA TOUR INC., a Maryland corporation,
Defendant-Appellant.

Argued and Submitted May 4, 1999.
Decided March 6, 2000

Before: CANBY and T.G. NELSON, *Circuit Judges*, and FOGEL,[1] *District Judge*.

CANBY, *Circuit Judge*:

PGA Tour, Inc. ("PGA") appeals from the district court's decision in favor of Casey Martin, a disabled professional golfer, ordering PGA to make an exception to its "walking rule" to allow Martin to ride a golf cart during PGA competitions. We conclude that the Americans with Disabilities Act ("ADA") applies to PGA competitions and that allowing Martin to use a cart is a reasonable accommodation that does not fundamentally alter the nature of those events. We therefore affirm the district court's decision.

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[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

BACKGROUND

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a congenital, degenerative circulatory disorder that is manifested in a malformation of his right leg. This disorder causes Martin severe pain and atrophy in his lower leg, rendering him unable to walk for extended periods of time. The mere act of walking subjects him to a significant risk of fracture or hemorrhaging. There is no dispute that Martin is profoundly disabled.

PGA is a non-profit association of professional golfers.[2] It sponsors three competitive tours: (1) the PGA Tour, its most competitive tour, (2) the Nike Tour, one step down from the PGA Tour, and (3) the Senior PGA Tour, restricted to professional golfers age 50 and over. On days of tour competition, PGA is the operator of the golf course.[3]

The primary means of gaining entry to the PGA Tour and Nike Tour is by a competition known as the qualifying school. The best scorers in that competition qualify for the PGA Tour, and the next-best finishers qualify for the Nike Tour. Players in the Nike Tour may qualify for the PGA Tour by winning three Nike Tour tournaments in one year or by being in the top fifteen money- winners in the Nike Tour.

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[2] We refer hereafter to the defendant PGA Tour, Inc. as "PGA," in order to differentiate it from the PGA Tour, which is one of the three tours sponsored by PGA Tour, Inc.

[3] The term "operates," as it is used in the ADA, is extensive and "would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time." 28 C.F.R. ch. I, pt. 36, app. B., at 628 (1999).

The qualifying school competition is conducted in three stages. In the first two stages, players are permitted to use golf carts. In the third stage, and in the PGA and Nike Tours themselves, players are required to walk as they play the course.[4] After qualifying for the third and final stage of the 1997 qualifying school, Martin requested permission from PGA to use a golf cart. PGA denied this request, and Martin sued.

The district court granted Martin a preliminary injunction and, using a golf cart, he performed well enough in the final stage of the qualifying school to earn a spot on the 1998 Nike Tour. The court subsequently granted Martin partial summary judgment, holding that PGA is subject to Title III of the ADA because it owns, operates and leases golf courses, which the ADA identifies as places of public accommodation.[5] *Martin v. PGA Tour, Inc.*, 984 F.Supp. 1320 (D.Or.1998). After a six-day bench trial, the district court concluded that modifying the walking rule for Martin was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments. *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1242 (D.Or.1998). It accordingly entered a permanent injunction requiring PGA to permit Martin to use a golf cart in PGA and Nike Tour competitions in which he is eligible to participate, and in any qualifying rounds for those tours. PGA appeals.[6]

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[4] Players are permitted to use golf carts on the Senior Tour.

[5] The district court also ruled that PGA is not exempt from the ADA as a "private club," *see* 42 U.S.C. § 12187, because, among other reasons, it is a commercial enterprise offering athletic events to the public. *Martin*, 984 F.Supp. at 1326. PGA has not challenged that ruling on this appeal.

[6] The district court awarded Martin attorneys' fees and costs. PGA has protectively appealed that order; it does not contest the amount but seeks reversal of the award if it succeeds on appeal. Because we affirm on the merits, we also affirm the award of fees and costs to Martin as the prevailing party.

DISCUSSION

I. *Applicability of Title III (Public Accommodation)*

The district court granted Martin's motion for summary judgment, holding that, as a matter of law, Title III of the ADA applies to the PGA and Nike Tour competitions. We review de novo the district court's interpretation of the ADA. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir.1999).

We begin our analysis, as did the district court, with the terms of the statute. The basic anti-discrimination clause of Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The first issue for decision is whether Martin seeks to enjoy the facilities of a "place of public accommodation." The definition section of Title III of the ADA provides:

> The following private entities are considered public accommodations for purposes of this subchapter . . .
>
> * * * * *
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(L) (emphasis added). There is nothing ambiguous about this provision; golf courses are public accommodations. Indeed, PGA does not dispute that during one of its tournaments a golf course is a public accommodation with regard to the spectator areas; its contention is that the competitors' area "behind the ropes" is not a public accommodation because the public has no right

to enter it. Despite the surface plausibility of this argument, it too narrowly construes the nature of a public accommodation.

The district court held that a public accommodation could not be compartmentalized in the fashion PGA desired. At least in the present context, we agree. It is true that the general public cannot enter the area "inside the ropes," but competitors, caddies, and certain other personnel can. PGA contends that the restricted area is not being used as a "place of exercise or recreation," within the meaning of § 12181(7)(L), because the competitors are trying to win money, not exercise or recreate. Even if we were to agree with this point, it would not aid PGA. The statute also defines "public accommodation" to include a "theater, . . . stadium or other place of exhibition or entertainment." 42 U.S.C. § 12181(7)(C). If a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment. The statute does not restrict this definition to those portions of the place of exhibition that are open to the general public. The fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation. *See Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 759 (D.Or.1997) (arena's executive suites contracted by businesses are public accommodations). Indeed, the underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands. *See, e.g., Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460, 483-90 (D.N.J.1998); *Tatum v. National Collegiate Athletic Ass'n*, 992 F.Supp. 1114, 1121 (E.D.Mo.1998); *Ganden v. National Collegiate Athletic Ass'n*, 1996 WL 680000, at *8-11 (N.D.Ill. Nov.21, 1996); *see also Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 344 (D.Ariz.1992) (undisputed that Title III applies to access to coaches' box on baseball field).

The Third Circuit dealt with a somewhat analogous problem in *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir.1998). There a physician with a disability sued a hospital under Title III after it denied him hospital staff privileges. The Third Circuit rejected the argument that Title III could be invoked only by the patients of a hospital, and held that denial of staff privileges qualified as a denial of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" prohibited by Title III, § 12182(a). *Id.* at 122. Staff privileges, of course, entail access to parts of the facility to which patients and the general public are denied entry.

In contending that it may compartmentalize golf courses during tournaments, PGA leans heavily on two examples set forth in the regulations. One is of a "mixed use facility," in the form of a large hotel that has a separate residential wing. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 623 (1999). The non-public residential wing (which would be covered by the Fair Housing Act) is not a place of "public accommodation." *See id.* The hotel wing, however, would fall under 42 U.S.C. § 12181(7)(A) as an "inn, hotel, motel, or other place of lodging." 28 C.F.R. ch I, pt. 36, app. B, at 623; *see* 42 U.S.C. § 12181(7)(A). But in this example, the residential wing has never functioned as a hotel. A golf course during a tournament, however, is serving as a golf course.

The other example cited by PGA is that of a commercial facility, such as a factory, that allows public tours over specific routes at particular times. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 624. The tour route is a public accommodation but the portions of the facility merely viewed from that route are not. *See id.* There are two reasons why this example is not persuasive. First, it applies to commercial facilities "not otherwise a place of public accommodation." *Id.* Second, the example would be analogous only if Martin were a spectator

seeking to use his golf cart within the competitors' area of a tournament.

This point brings us to the greatest difficulty with PGA's argument. It assumes that there is nothing public about the competition itself. According to PGA, the fact that its tournaments are restricted to the nation's best golfers means that the courses on which they play during tournaments cannot be places of public accommodation. But the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation. For example, Title III includes in its definition "secondary, undergraduate, or postgraduate private school[s]." 42 U.S.C. § 12181(7)(J). The competition to enter the most elite private universities is intense, and a relatively select few are admitted. That fact clearly does not remove the universities from the statute's definition as places of public accommodation. It is true that the rest of the public is then excluded from the schools, but the students who are admitted are nevertheless members of the public using the universities as places of public accommodation.[7]

Competition to enter the select circle of PGA and Nike Tour golfers is comparable. Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in the qualifying school. At the initial stage, it seems plain that the golf course on which the elimination begins is a place of public accommodation. As even PGA admits, "[t]he competition areas of some amateur

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[7] Title III does not restrict its coverage to members of the public; it provides that "No individual shall be discriminated against" in the enjoyment of public accommodations by reason of disability. 42 U.S.C. § 12182(a) (emphasis added). This provision does not, however, grant access to a place where the individual is not entitled to be; the rejected applicant for admission is not entitled to access to the university, and the spectator is not entitled to access to the tees, fairways and greens during a PGA golf tournament.

sporting events may well constitute places of public accommodation under Title III of the ADA when virtually any member of the public can participate." We fail to see, however, why a winnowing process would change the nature of the facility. If a stadium owner invited the public to compete in long distance races, and continued to run heats until only the ten best runners remained, the track would be no less a place of public accommodation when the final race was run. We see no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation. Nor do we see any such justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living.

We conclude, therefore, that golf courses remain places of public accommodations while a PGA tournament is being conducted on them.

II. *Reasonable Modification (Accommodation)*

Title III further defines "discrimination" to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications *would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added).

Here, it is clear that permitting Martin to use a golf-cart is "reasonable" in the sense that it solves the problem of Martin's access to the competition. It is also "reasonable," as the district court found, in that golf-carts are used in other

competitions (such as those on the Senior Tour), and it is not a difficult practical matter to permit them. Use of a golf cart is also "necessary"; there was ample evidence to support the district court's finding that Martin could not walk the course, even with artificial aids. These matters are no longer in serious contention.

The issue on which most of the dispute centers is whether permitting Martin to use a golf cart will "fundamentally alter" the nature of the goods or service—the PGA or Nike Tour. It is readily apparent that walking is not essential to the generalized game of golf. Rule 1-1 of the Rules of Golf, promulgated by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland, states:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

These Rules do not require players to walk. Indeed, PGA does not require players to walk in the early stages of the qualifying school or in the Senior Tour.

PGA correctly points out, however, that it is not offering the generalized game of golf in its PGA and Nike Tours, it is offering a particular competition. PGA provides, in the Conditions of Competition for its PGA and Nike Tours, that "[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." On occasions when the Committee has permitted players to ride, the waiver applies to all competitors, as when all players must be shuttled from the 9th green to the 10th tee when the distance is great. It also appears that, to save time, rides have been given from the fairway back to the tee to players who have lost a ball and must tee off again.

The issue for decision, then, is whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions. That issue was fully tried in the district court.

The district court found that the purpose of requiring players to walk was to inject a fatigue factor into the shot-making of the game. *Martin*, 994 F.Supp. at 1250. It also found, however, that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." *Id.* It further found that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, "fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here." *Id.* at 1251. The court noted that, given the choice of carts or walking in other tours, large numbers of players chose to walk. *See id.* In the events in which PGA permits carts, it assigns no handicap penalty to those who ride as opposed to those who walk. *See id.* at 1248.

There was ample evidence to support all of these findings, and they are not clearly erroneous. Against this background, the district court evaluated whether use of a cart would give Martin an advantage over the other players who were required to walk. Even with a cart, Martin must walk about twenty-five percent of the course because the cart cannot be brought near to the ball in many cases. Martin endures significant pain while walking, and while getting in and out of his cart. The district court, after considering these factors, found that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." *Id.* at 1252.

In light of these findings, we conclude, as did the district court, that permitting Martin to use a golf court in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions. The central competition in

shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.[8] That is precisely the purpose of the ADA. *See* 42 U.S.C. § 12101(a)(5) (discrimination against disabled includes "failure to make modifications to existing facilities and practices"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir.1996) (Congress intended ADA to cover discriminatory impact of facially neutral barriers).

PGA argues that the kind of balancing engaged in by the district court and now by this court is wholly illegitimate. It agrees that some athletic rules, such as dress codes or uniform requirements, may be subject to exceptions to accommodate the disabled. But it contends that a rule intended to affect the competition cannot be made subject to exception. According to PGA, the case should have ended in its favor the moment the district court concluded that the purpose of PGA's walking-only rule was to inject the fatigue factor into the competition. Once that rule is determined to be "substantive," according to PGA, it is not subject to exceptions to accommodate disability.

The difficulty with this position is that it reads the word "fundamentally" out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that the accommodation would "fundamentally alter the nature" of its competition. 42 U.S.C. § 12182(b)(2)(A)(ii). PGA essentially argues that permitting a player to ride alters the competition and inquiry must stop there. It makes all alterations of the competition fundamental. But the statute

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[8] We note that the NCAA and Pac-10 rules of competition require players to walk and carry their own clubs. Martin applied for, and was granted, a waiver of that rule that permitted him to compete in college tournaments when he was a student.

mandates an inquiry into whether a particular exception to a rule would "fundamentally alter" the nature of the good or service being offered. The issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so. The evidence must "focus [ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir.1997). We cannot tell whether a golf cart for Martin fundamentally alters the competition without first investigating whether walking is fundamental to the competition. The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of reach of the ADA. The district court, as we have said, found that the fatigue factor injected into the game by walking was not significant, and that finding was not clearly erroneous.

The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race, or that a growth-impaired basketball player be allowed to shoot 3-point baskets from inside the three-point line. We have little doubt that fact-based inquiries into the effects of such accommodations would result in rulings that those accommodations fundamentally altered the competitions. The same would be true if Martin were seeking to use a special golf ball that carried farther than others, or was seeking to play a shorter course than his competitors. Martin, however, seeks only to use a cart between shots, and the district court, after considering the evidence presented in a full trial, found that this accommodation does not fundamentally alter the competition.

PGA next contends that it was wholly improper for the district court to consider whether Martin's condition was such that riding would not give him an unfair advantage over competitors who walked. PGA has steadfastly declined to consider Martin's condition in adhering to its position that permitting him to use a cart would fundamentally change its competition. It contends that it would be far too burdensome for PGA to determine whether disabled individuals using carts would have an advantage over non-disabled walking competitors. PGA relies on *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir.1995), which upheld an upper-age limit for high school athletes. *Sandison* rejected an argument that over-age would not provide a competitive advantage for the learning-disabled plaintiffs because they were of only average athletic ability; it stated that "[i]t is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage." *Id.* at 1035; *see also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 462 (6th Cir.1997) (upholding maximum eight-semester eligibility rule on same grounds); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 931 (8th Cir.1994) (same).

The foundation of these cases, however, was a finding, or evidence compelling a finding, that the rule against older or more experienced high- school athletes was necessary to protect the competition in the lower age group, and to prevent "red-shirting" of athletes to permit them to compete when older and more experienced than the others. *See Sandison*, 64 F.3d at 1035; *McPherson*, 119 F.3d at 462; *Pottgen*, 40 F.3d at 931 & n. 6. The record in this case is quite different; the district court found that the fatigue factor introduced by walking was not significant.[9]

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[9] This finding also distinguishes Martin's case from *Olinger v. United States Golf Ass'n*, 55 F.Supp.2d 926 (N.D.Ind.1999), in which the district

Moreover, we do not share the antagonism to individual determinations reflected in these cases. "We prefer the approach of Judge Richard Arnold, dissenting in *Pottgen*, that the inquiry must focus on the individual exception and that, in light of the plaintiff's individual characteristics as found by the district court, the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule." *Pottgen*, 40 F.3d at 932 (dissenting opinion). The Seventh Circuit adopted such an approach in *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, — U.S. —, 120 S.Ct. 579, 145 L.Ed.2d 482 (1999), in enjoining enforcement of an eight- semester rule against a learning-disabled student. It observed that applying the eight-semester rule to exclude the particular plaintiff would not "add anything to the protections provided by the IHSAA's age limit rule, which generally limits the size, strength and athletic maturity of student athletes." *Id.* at 852. The court continued:

> Nor will the record support the argument that a waiver of the rule in Mr. Washington's case would place an undue administrative or financial burden on the IHSAA. The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden.

Id. Much the same can be said here. Nothing in the record establishes that an individualized determination would impose an intolerable burden on PGA. Although PGA refused

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court found on the evidence there presented that use of a cart can provide a golfer with a competitive advantage over a golfer who walks. *See id.* at 935. To the extent that other rulings in *Olinger* are inconsistent with our decision today, we respectfully disagree with it.

to consider the effect of Martin's disability, the district court appeared to have little difficulty making the factual determination that providing Martin with a golf cart would not give him an unfair advantage over his competitors. We conclude that, under the ADA, that determination was a proper one for the court to make. *See Johnson*, 116 F.3d at 1059-60 (fundamental alteration defense focuses on individual circumstances).

CONCLUSION

We conclude that, under Title III of the ADA, a golf course is a place of public accommodation while PGA is conducting a tournament there. We also conclude that the district court did not err in determining that the provision of a golf cart to Martin was a reasonable accommodation to his disability, and that use of the cart by Martin did not fundamentally alter the nature of the PGA and Nike Tour tournaments. We accordingly affirm the judgment of the district court.[10]

AFFIRMED.

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[10] Our ruling that Martin is entitled to relief under § 12182(a) of Title III makes it unnecessary to address his alternative arguments.

UNITED STATES DISTRICT COURT,
D. OREGON.

No. 97-6309-TC.

CASEY MARTIN,

Plaintiff,

v.

PGA TOUR, INC., a Maryland Corporation,

Defendant.

Feb. 19, 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COFFIN, United States Magistrate Judge.

This case presents profound questions regarding the application of the Americans with Disabilities Act (ADA). Does the ADA apply to athletic events or sports organizations? If so, are the most elite events and organizations, such as those at the professional level, somehow exempt from coverage? If the ADA is applicable, may a rule of competition be modified to accommodate a disabled competitor, or are the rules untouchable because any alteration of any rule would fundamentally alter the nature of the competitions?

Casey Martin is a disabled professional golfer. He can do everything well in the game of golf except walk to and from his shots. Because of a congenital deformity, his right leg is severely atrophied and weakened. He is placed at significant risk of fracturing his tibia by the simple act of walking, because of the increasing loss of bone stock and weakening of this bone that has occurred over the lifetime of this disorder. According to the medical testimony, walking also places

Martin at significant risk of hemorrhaging as well, and creates an increased chance of developing deep venous thrombosis (blood clots).

The condition plaintiff suffers from causes him severe pain and discomfort. The slightest touching of his right leg at or below the knee is extremely painful. Beyond this, the condition causes him pain while playing golf, pain while carrying on daily activities and pain even while he is at rest.

A video of plaintiff's condition introduced into evidence at the trial, provides compelling evidence of the nature and extent of his disability[1]: The right leg appears to be about half the size of plaintiff's left leg. When plaintiff removes his double set of support stockings and stands upright, the leg immediately discolors and swells in size because the circulatory condition with which he is afflicted prevents the blood from flowing through his veins back to the heart. Instead, gravity, combined with "incompetent" valves which fail to close properly, pulls the blood back down his leg. The leg becomes engorged in blood because the arteries pump blood to his leg but the veins fail to circulate blood back to the heart. To relieve this situation, plaintiff must lie down and elevate the leg.

A double set of support or compression stockings provides plaintiff with enough venous pressure to allow him to remain

[1] Defendant PGA Tour objected to the introduction of the video on grounds of relevance and hearsay. The objection as to relevance was based on the PGA's position that it conceded Martin has a disability and this evidence on that issue was unnecessary. However, as I will explain more fully *infra*, I disagree with the PGA's contention that an individualized assessment of Casey Martin's disability is irrelevant to the outcome of this case. Consideration of the nature and extent of plaintiff's disability is critical to determining whether use of a cart affords him a reasonable accommodation under the circumstances presented. The hearsay objection concerned certain audio portions of the tape, which portions were stricken from the record.

upright for periods of time. As he has gotten older (he is now 25 years of age), his leg has steadily worsened because of his disability. Whereas he used to be able to walk a golf course (albeit with difficulty), he can no longer do so. As noted, he is at substantial risk of serious physical harm by the mere act of walking.

Dr. Donald Jones, plaintiff's treating physician, counsels that it is medically necessary for Casey Martin to be permitted a cart it [sic] he is to play the game of golf. As he summarized plaintiff's condition:

> [T]he medical records reflect a 25-year old male with a rare congenital vascular malformation of the right lower extremity which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock, pain so severe that he has at least considered to explore the use of time contingent narcotics; number two, a documented sleep disorder secondary to chronic pain which leads, according to Dr. Holmes, to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and weakness in his right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing abnormalities which are painful; and number six, and most important from the orthopedic aspect, it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

Transcript (#) at pp. 99-100.

Defendant PGA Tour does not contest that plaintiff has a disability within the meaning of the ADA, nor does it contest that his disability prevents him from walking the course during a round of golf. However, prior to this trial, defendant did not review plaintiff's medical records nor view the

videotaped presentation of his condition. The PGA's position in this case has been twofold:

First, it asserts that the ADA does not apply to its professional golf tournaments; and

Second, the PGA asserts that the requirement of walking is a substantive rule of its competition and that a waiver of the rule would, accordingly, result in a fundamental alteration of its competitions, which the ADA does not require.

The first defense raised by the PGA—that the ADA is inapplicable to its tournaments—has been extensively discussed in this court's order dated January 30, 1998(# 69), wherein I found that the PGA Tour was not exempt, as a "private club," from ADA coverage and also found that its tournaments were conducted at places—i.e., golf courses—that were specifically included within the definition of places of "public accommodation" subject to the ADA.

The second defense encompasses the concept that the ADA does not require a covered entity to work a fundamental alteration of the nature of its business or programs in order to accommodate the disabled, nor need the entity accommodate if to do so would result in an undue hardship to the entity.

A few examples suffice to illustrate this point: Suppose a bookstore normally does not stock books in braille. A blind customer demands the accommodation of a supply of such books. The bookstore need not comply with the request, as such an accommodation would fundamentally alter the nature of its business. *See* 28 C.F.R. Ch. 1 Pt. 36, App. B at p. 632 (July 1, 1997 edition).[2] Or, to use another example cited by

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[2] If the disabled person were an employee of the bookstore, however, and required a braille-encoded computer to perform her tasks, a different analysis would be applied and the question would be whether the accommodation would be an undue hardship (e.g., too great a financial burden) on the employer. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12111(10). Because I find that Casey Martin is not an employee of the PGA Tour

the PGA, a day care center normally does not provide individualized care (*i.e.*, one attendant for each child) to its customers. A disabled child, in need of individualized attention, requests such an accommodation. The day care center need not comply because such would fundamentally alter the nature of the service the center provides.

There are few reported cases wherein the ADA has been applied to sports programs:

The Sixth Circuit Court of Appeals applied the ADA to the Michigan High School Athletic Association on two separate occasions regarding eligibility requirements. In *McPherson v. MHSAA*, 119 F.3d 453 (6th Cir.1997) the court considered whether the MHSAA's eight semester rule[3] violated the ADA when applied to a student with a learning disability which prevented him from completing high school in eight semesters. The court initially noted that the simple fact that the MHSAA labeled the rule necessary did not make it so, but that the court had an independent responsibility to determine whether the rule is in fact necessary. *Id.* at 461. The court determined the rule was necessary.[4] The court then found that requiring the MHSAA to waive the rule would work a fundamental alteration in its sports programs and would impose an immense financial and administrative burden on

(infra). I focus only on the issue of whether he is entitled to his requested accommodation (the use of a golf cart) as an independent contractor playing in defendant's tournaments which are held at places of public accommodation.

[3] The MHSAA's eight semester rule provided that any student who has completed eight semesters of high school is ineligible for interscholastic sports competition.

[4] The purpose of the rule was to limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the players who observe the rule a fair opportunity to compete for playing time.

the MHSAA by forcing it to make "near impossible determinations" about a particular student's physical and athletic maturity.

Two years prior the court similarly found that waiver of an age regulation in high school sports fundamentally altered the program. *See Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir.1995). The court noted, as it did in *McPherson*, that individually determining whether each older student possessed an unfair competitive advantage was not a reasonable accommodation. *Id.* at 1037.

The Eighth Circuit was confronted with a similar age eligibility rule of the Missouri State High School Athletic Association. *See Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir.1994). In *Pottgen* the court found that the age requirement was essential to the high school athletic program and that an individualized inquiry into the necessity of the requirement in the plaintiff's case was inappropriate. *Id.* at 930.[5]

The District Court for the District of New Jersey found that complete abandonment of the "core course" requirement would fundamentally alter the nature of NCAA athletic programs. *Bowers v. National Collegiate Athletic Assoc.*, 974 F.Supp. 459 (D.N.J.1997). The *Bowers* court found the "core course" requirement essential because it was reasonably necessary to accomplish the purpose of the NCAA program. However, the court also noted that the rule authorized waiver

[5] Plaintiff cites two district court cases in which an individualized inquiry was conducted to determine whether waiving the age rule for the individual plaintiffs would undermine the purpose of the rule, but each was vacated as moot. *See Johnson v. Florida High School Activities Assoc.*, 899 F.Supp. 579 (M.D.Fla.1995), *vacated as moot* 102 F.3d 1172 (11th Cir.1997); *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F.Supp. 663 (D.Conn.1996), *vacated as moot* 94 F.3d 96 (2nd Cir.1996).

of the requirement on a case-by-case basis for individualized consideration and as such was adequate to reasonably accommodate students with learning disabilities. *Id.* at 467.

From this rather limited background of athletic ADA case law, the PGA asserts that the court should focus on whether an athletic rule is "substantive"—*i.e.*, a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is, according to the PGA's argument, the rule cannot be modified without working a fundamental alteration of the competition, and the ADA consequently does not require any modification to accommodate the disabled.

I note, however, that even in those cases most heavily relied upon by the PGA the courts examined the purpose of each of the rules in question to determine if the requested modification was reasonable.

In *Sandison* and *McPherson*, the eligibility requirements imposed were closely fitted with the purpose of high school athletics—to allow students of the same age group to compete against each other. The learning-disabled plaintiffs who had passed beyond the age or semester limits while still remaining in high school could not compete without fundamentally altering the nature of the services at issue. That the plaintiffs in those cases may have been less skilled athletes than their peers missed the point. High school athletics are for youths of a certain age group (14-18). Eliminating the curriculum or age-eligibility requirements for high school athletes clearly changes the fundamental nature of such competition.

Similarly, in *Bowers*, the issue was the "core course" requirement for student-athletes at the collegiate level. An athlete had to be a qualified student to compete. A complete waiver of the academic requirement would obviously alter the fundamental nature of the program, and, as noted, individual assessments and exemptions were permitted.

That is not to say that athletic associations have unfettered discretion to set eligibility requirements as they see fit. May a high school athletic association expressly define eligibility requirements so as to exclude the learning or other disabled? If it did, would the courts simply be left to conclude that any change in such a rule would fundamentally alter the rules of competition and by virtue of such be unreasonable? For example, may a high school league promulgate a rule prohibiting competitors from using corrective lenses to assist their vision at athletic events—and be immune from ADA scrutiny because an accommodation to the sight-impaired would fundamentally alter a rule of competition?

Essentially, then, the PGA Tour's contention that it alone may set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments, is simply another version of its argument that the PGA Tour is exempt from the provisions of the ADA. It is not. The court has the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule, and without altering the fundamental nature of PGA Tour competition.

Although the PGA Tour is a professional sports organization and professional sports enjoys certainly, a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. High school athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals. Put differently, if it is unreasonable to accommodate Casey Martin's disability with a cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled

golfer at the high school level if the same rules were applicable.

It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a reasonable modification be made to accommodate a disabled individual?

An example from a prior case filing illustrates the tension that exists between the disabled seeking equal access and an entity that must modify its rules or practices to accommodate: A man afflicted with cerebral palsy books an international flight on a commercial airline from Oregon to Germany. The first leg of the flight takes the disabled individual from Eugene, Oregon to Chicago, Illinois, where he changes planes for the next leg of the trip. The captain of the airlines for the international leg, however, decides that the individual's condition (which hasn't changed since the first flight) renders him unfit to travel safely, and so he orders him off the plane. This unfortunate person's journey is interrupted solely because of his disability, and he is relegated to languish in a hotel room (away from his home and away from his destination) until a captain can be found who is willing to admit him as a passenger.[6]

The rule at stake in the above example is the age-old rule that the captain is in charge of the ship. This rule has an obvious and important substantive purpose. Nonetheless, are the disabled not entitled to travel to their destinations with the

[6] *See* Civil Number 93-6068-TC.

same degree of reliance on their arrangements as the able-bodied? Put differently, doesn't the ADA (or its counterpart, the Rehabilitation Act) require the airlines to modify the rule to provide a reasonable accommodation—i.e., a flight there and back without interruption by an uncomfortable captain—under the specific circumstances of his case, even though such might modify a substantive rule of its operation?

It is with these concepts in mind that I approach Casey Martin's request for an accommodation.

First, I set forth (and perhaps restate to some extent), a general overview of the ADA. As I reject (without detailed elaboration[7]) plaintiff's claims that he is a PGA Tour employee and that the Nike Tour is a "course or examination" under the Act, I will discuss only his remaining claim, *i.e.*, the "public accommodation claim" under Title III of the Act.

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.
>
> . . . .
>
> discrimination includes failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the good, service, facility, privilege, advantage, or

[7] For the most part, I agree with, and incorporate by reference, the argument set forth by defendant in its memorandum in support of summary judgment regarding the employee, and course and exam issues. *See* Defendant's Memo (# 21).

accommodation being offered or would result in an undue burden.

. . . .

discrimination also includes the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(i) and (ii)

The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices. . . ." Congress intended to protect disabled persons not just from intentional discrimination but also from "thoughtlessness," "indifference," and "benign neglect." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir.1996).

ADA defines disability with respect to an individual as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

The phrase physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104(1).

The phrase major life activity means:

functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. § 36.104(2).

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

1. the nature and severity of the impairment;

2. the duration or expected of the impairment; and

3. the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).8 [FN8]

Temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually

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[8] The regulations concerning temporary impairments are found in the section concerning Title I (employment) of the ADA, but are useful in determining whether a disability exists under Title III.

not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, etc. *Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir.1996). Temporary injury with minimal residual effects cannot be the basis for a sustainable claim under the ADA. *Id.*

Plaintiff has the burden of demonstrating that he is disabled and has done so. Plaintiff also has the burden of proving that a modification was requested and that the requested modification is reasonable. "Plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, in the general run of the cases." *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir.1997). With respect to this element, the use of a cart is certainly not unreasonable in the game of golf. As noted hereafter, the Rules of Golf do not require walking, and even the PGA Tour permits cart use at two of the four types of tournaments it stages.[9] While the PGA Tour permits cart use at those two events, it imposes no handicap system or stroke penalties on those who opt for carts as opposed to those who elect to walk. This is certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making. In addition, the NCAA and PAC 10 athletic conference permit the use of carts as an accommodation to disabled collegiate golfers. Under the Johnson analysis such evidence meets plaintiff's burden of demonstrating that a cart is a reasonable

[9] The PGA Tour stages the PGA Tour, senior PGA Tour, the Nike Tour, and the Qualifying School Tournament. The Senior Tour is for PGA Tour golfers of 50+ years in age. The Qualifying School Tournament screens those who are competing for entry into the PGA Tour and Nike Tour. The PGA Tour admits the most skilled golfers; the Nike Tour admits those at the next highest level. The PGA Tour allows cart use on the Senior PGA Tour and in the two preliminary rounds of the Qualifying School Tournament.

modification to accommodate his disability in the game of golf in the general sense, that is in the general run of cases.

Defendant then must make the requested modification unless it meets its burden of proving that the requested modification would fundamentally alter the nature of its public accommodation. "The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." Id. Defendant argues that an individualized inquiry into the necessity of the walking rule in Casey Martin's case is not appropriate. *See e.g., Pottgen*, 40 F.3d at 930-31. However, Johnson suggests otherwise. An individualized assessment finds support in the Ninth Circuit as well. *See Crowder*, 81 F.3d at 1486 ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *see also Stillwell v. Kansas City, Missouri Bd. of Police Commissioners*, 872 F.Supp. 682, 687 (W.D.Mo.1995) (individualized assessment necessary to determine if plaintiff can meet the purpose of defendant's rule). Thus, the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.[10]

The Rules of Golf

The general "Rules of Golf" are promulgated by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland (R & A).

[10] At this stage of the analysis, I agree with the PGA that only the nature of PGA and Nike Tour golf may be considered in determining whether the requested modification would cause a fundamental alteration. However, as noted, I do not agree with defendant's position that this analysis is to be undertaken without an individualized assessment of Casey Martin's disability.

Rule 1-1 provides as follows:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

Nothing in the Rules of Golf requires or defines walking as part of the game. In its reported Decisions on the Rules of Golf regarding the Rules of Golf, the USGA has expressed that it is permissible to ride a cart in golf unless such is prohibited by the local rules defining the conditions of competition for particular events. In Appendix I to the Rules of Golf we find:

> Transportation
>
> If it is desired to require players to walk in a competition, the following condition is suggested:
>
> Players shall walk at all times during a stipulated round.

The PGA Tour promulgates a pamphlet entitled "Conditions of Competition and Local Rules" which govern PGA Tour and Nike Tour tournaments. The preamble to this document provides, in pertinent part, as follows:

> The Rules of the United States Golf Association govern play, as modified by the PGA Tour.
>
> One of those modifications appears in Section A--Conditions of Competition:
>
> ¶ 6 *Transportation--Appendix I*
>
> Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee.

No written policy has been cited by either party which governs the Rules Committee in its exercise of discretion regarding a waiver of the walking requirement. On the occasions when the walking rule has been waived, it has been

waived for all competitors (e.g., to shuttle players from the 9th green to the 10th tee where considerable distance is involved). No waiver has ever been granted for individualized circumstances (such as disability).

Prior to requesting use of a cart as an accommodation for his disability, plaintiff explored the possibility of various artificial aids to walking. I allow Dr. Jones to describe what those were, and why they won't work:

> By August 1996 at the age of 24, Casey reported to me that he was having tremendous difficulty with ambulation. He was having great difficulty walking 18 holes of golf. He was not only having trouble with the golf, but was also now having significant discomfort with the requirements of daily living. At this point I immobilized his leg in a removable brace and started a physical therapy program. Neither was beneficial.
>
> By now Casey was becoming extremely frustrated, so I decided to accompany him during a number of rounds during the summer of 1996.
>
> Q. You are talking about rounds of golf?
>
> A. Rounds of golf.
>
> Q. Okay.
>
> A. In hopes that I could observe some characteristics of his gait that would allow me to provide him with some form of stabilizing device. During this time, we tried in—shoe orthosis; that is, shoe inserts, which were of minimal benefit.
>
> Q. What were they intended to do?
>
> A. They will stabilize the hindfoot, and there's a biomechanical region whereas if you stabilize the hindfoot, the tibia doesn't rotate with the gait and will hopefully decrease the pain.

Q. The right leg is slightly longer also?

A. Yes.

Q. Okay. And that right leg being longer, is due to this condition?

A. Yes.

Q. Okay. All right. What was next?

A. We also placed him into ankle-foot orthosis. Now, that's a plastic brace that extended from the toes to the mid-calf and is for the purpose of stabilizing his hindfoot and, also, protecting his tibia. Casey found that it was virtually impossible to golf in this device because it limited his hindfoot motion as well as the fact that it caused considerable discomfort over his calf which is very sensitive. It was during this time that I became increasingly concerned about the well being of Casey's lower extremity. I can recall playing two rounds of Golf with Casey where he was unable to finish the 18 holes while walking. I also recall this summer one round of golf where we used a golf cart. The ground was moderately wet and unstable. We could not park as close to the tee box or to the green as we normally would. As a result, Casey, had to stop his round at about the 14th hole because he was having difficulty just getting to the tee box and green.

Transcript (#) at pp. 88-90.

Thus, Casey Martin cannot walk the course, and only a cart will permit him to compete on the Nike Tour. As with the disabled airline passenger, he finds himself in conflict with a substantive rule of operation.

According to the PGA Tour, the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making. I accept that assertion and expressly find from the

evidence produced at trial that such is a cognizable purpose[11] of the rule from the standpoint of the ADA.

The question thus is—may the walking rule be modified to accommodate Casey Martin without fundamentally altering the nature of the game being played at the PEA Tour's tournaments?

In answering the question, as noted previously, I reject the defendant's contention that the plaintiff's individual circumstances are irrelevant to the inquiry. *See Johnson, Crowder, Stillwell*, cited *supra* p. 1249.

Furthermore, the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances. Dr. Gary Klug, a professor in physiology at the University of Oregon, and an expert on the physiological basis for fatigue, calculates that approximately 500 calories are expended in walking a course of golf (approximately 5 miles of walking in a 5 hour time period). He describes the energy expenditure as follows: "nutritionally it's less than a Big Mac." He further notes that these calories are expended over a 5 hour period, and that the golfers have numerous intervals of rest and opportunities for refreshment (or calorie replacement).

While the PGA Tour cited Ken Venturi's memorable 1964 U.S. Open win in which he overcame severe and near-fatal exhaustion as he finished the course in high heat and humidity, Dr. Klug indicates that Mr. Venturi's fatigue was induced by heat exhaustion and fluid loss—not walking. According to Dr. Klug, tests have disclosed that fatigue from exercise—as measured by oxygen consumption—is not significantly influenced by heat or humidity. Rather, dehydration is the critical factor in such situations. Many

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[11] Mere tradition would not be a cognizable purpose—i.e., one entitled to any weight.

spectators at the 1964 U.S. Open had to be treated for exhaustion as well, and they were not walking.

Furthermore, fatigue at lower intensity exercise[12] is primarily a psychological phenomenon, according to Dr. Klug. Stress and motivation are the key ingredients here. Place an individual in the middle of the Los Angeles freeway at rush hour, and he will get fatigued in a hurry without moving a muscle. If someone pedals a bicycle for 30 minutes and says "I've had it," but is promised $1,000 if he goes another 5 minutes, his fatigue may well disappear.

Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue.[13]

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[12] Walking 5 miles in 5 hours cannot be equated with high intensity exercise. A requirement of running, or even walking, 5 miles at a continuous gait would certainly induce more fatigue from the physiological standpoint, but that is not what the PGA Tour requires. To quote from Nike Tour golfer Eric Johnson: _

Q. does [walking] create any problem for you?

A. Not more than the temperature outside would cause a person to sweat just standing there or cause a person to be very cold just standing there. There are--there are cases and instances where we play golf courses that are hilly where you might have to walk up a hill, and you would be more exerted when you get to the top of the hill than if you were walking a flat surface or downhill. But because of the pace of play and our preshot routines, we know to not to hit when we are winded or we know not to hit until we are ready to hit the golf ball. So I can't think of a time in my golfing career where I've ever hit a golf shot where I've felt that I wasn't ready to hit.

Transcript (#) at p. 33.

[13] As Nike Tour pro Eric Johnson described when asked why he preferred to walk:

When given the option of cart-riding or walking—such as at the Senior PGA Tour or PGA Tour Qualifying Tournament--the vast majority have opted to walk. Why would this be if walking truly fatigued them so that they hit worse shots than if they ride? As the saying goes, "the proof of the pudding is in the eating."

And then we come to Casey Martin's unique circumstances. If the majority of able-bodied elect to walk in "carts optional" tournaments, how can anyone perceive that plaintiff has a competitive advantage by using a cart given his condition?

The fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able- bodied by the requirement that they walk from shot to shot. Walking at a slow pace[14]—to

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I prefer to walk, probably for a number of reasons. One, it's how I've played golf most of my life, and it keeps me in rhythm. There are times when I would prefer to walk because the temperature outside is such that if you are in the golf cart, the wind chill factor drops when you are riding in it and you are too cold. Weather's a real large contributing factor in walking. I would much rather walk if it was raining because I am able to stay under my umbrella and not get as wet, my equipment stays dry, those types of things.

Q. All right. Are you better able to get the feel of the course when you walk as opposed to ride, or do you know?

A. You get a full effect of the elements. Everything from changes in wind direction from one part of the fairway to the other, to being able to watch what the flag stick's doing on the green, to walking down the fairway versus being in the golf cart trying not to run somebody over.

Transcript (#) at p. 17.

[14] The PGA Tour does not require golfers to walk rapidly to their next shot. There do not appear to be any time limits on getting to the ball, although a golfer has 5 minutes to find a lost ball. Once at the ball, a golfer has 40 seconds to hit it. If a golfer is closest to the hole, he has additional time to rest while the other members of his group hit their shots.

the able-bodied—is a natural act, of little more difficulty than breathing. It is how we were designed to move from place to place.

Walking for Casey Martin is a different story.

In the first place, he does walk while on the course—even with a cart, he must move from cart to shot and back to the cart. In essence, he still must walk approximately 25% of the course. On a course roughly five miles in length, Martin will walk 1 1/4 miles.

The plaintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at a risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

As plaintiff easily endures greater fatigue even with a cart than his able- bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

It lends emphasis to the point that the walking rule may be modified without fundamentally altering the PGA's game to consider several other PGA rules in a hypothetical context.

Rule 6-4 of the Rules of Golf specifies:

Caddie

The player may have only one caddie at any one time, under penalty of disqualification.

Rule 8 provides:

Advice; Indicating Line of Play

Definitions

"Advice" is any counsel or suggestion which could influence a player in determining his play, the choice of a club or the method of making a stroke.

Information on the Rules or on matters of public information, such as the position of hazards or the flagstick on the putting green, is not advice.

The "line of play" is the direction which the player wishes his ball to take after a stroke, plus a reasonable distance on either side of the intended direction. The line of play extends vertically upwards from the ground, but does not extend beyond the hole.

And Rule 8-1 states:

Advice

During a stipulated round, a player shall not give advice to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner or either of their caddies.

May these be modified to accommodate a disabled golfer--e.g., a blind golfer?

Interestingly, the USGA promulgates a pamphlet entitled *A Modification of the Rules of Golf for Golfers with Disabilities*. The Preface to the Pamphlet reads:

> This publication contains permissible modifications to the Rules of Golf for use by disabled golfers. This is not intended to be a revision of the Rules of Golf as they apply to able-bodied players. As is the case for the Rules of Golf themselves, these modifications, along with the philosophy expressed herein, have been agreed upon by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland.

Under the category of Blind Golfers, the pamphlet provides:

Definition of "Coach"

The status of the coach and the duties which he may perform should be defined clearly. Without such clarification, it would be difficult, for example, to determine how a blind golfer must proceed if his ball were to strike his or another player's coach after a stroke. Therefore, the following definition is recommended:

> Coach
>
> A "coach" is one who assists a blind golfer in addressing the ball and with the alignment prior to the stroke. A coach has the same status under the rules as a caddie.
>
> Note: A player may ask for and receive advice from his coach.

And the Caddie and Advice rules are modified as follows:

Rule 6-4 (Caddie)

There is nothing in the rules which would prohibit the coach of a blind golfer from functioning as his caddie. For a variety of reasons, however, a coach may not be able to perform the duties of a caddie. Therefore, it is permissible for a blind golfer to have both a coach and a caddie. In such circumstances, however, the coach may not carry or handle the player's clubs except in helping the player take his stance or him as permitted by analogy to Decision 6-4/4.5. Otherwise, the player would be subject to disqualification for having more than one caddie.

Rule 8-1 (Advice)

In view of the Definition of "Coach," it is recommended that Rule 8-1 be modified as follows:

> 8-1. Advice
>
> During a *stipulated round*, a player shall not give *advice* to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner, either of their caddies or, if applicable, their coaches.

Judy Bell, a former president of the USGA, testified that the Golfers with Disabilities pamphlet was not meant for the PGA Tour, but only for recreational golfers. While that may be, it begs the question of how the PGA Tour would handle the request of a blind pro golfer to have a coach in addition to a caddie. At oral argument, the attorney for the Tour was asked whether Rules 6- 4 and 8-1 could be modified without fundamentally altering the nature of the PGA's competition. To quote from the colloquy:

> THE COURT: How about the caddie and the coach for the blind golfer, as the pamphlet describes?
>
> MR. MALEDON: Your Honor, my answer would be the same. As long as it does not fundamentally alter the nature of the competition, there's not a problem with it. But again, You Honor, you'd have known the facts. You'd have to look at the purpose for the rule. And I submit to you, Your Honor, that engaging in those kinds of analogies do not advance the ball in terms of what we are talking about here.
>
> THE COURT: If I look at whether the purpose of the walking rule is to enhance competition by injecting fatigue into the equation, do I look at what Mr. Martin's disability does to him specifically insofar as inducing fatigue?

MR. MALEDON: No, Your Honor Absolutely not.

The paradox presented in the PGA Tour's position is readily apparent. A modification of the "one caddie only" rule to accommodate a blind golfer by providing him with a coach does not become the "reasonable" thing to do unless the PGA first conducts an individualized assessment of the golfer's disability--i.e., the PGA Tour must first recognize that he is blind, and then consider whether providing him a coach under his circumstances would give him a competitive advantage over the other golfers who aren't blind and thus don't need a coach. Yet in Casey Martin's situation, the PGA Tour adamantly refuses to assess the requested modification in light of the specifics of his disability. Inconsistently, it insists in this case that any modification of any of its rules would fundamentally alter the nature of its competition.

The rules, as demonstrated, are not so sacrosanct. The requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability.

SO ORDERED.

UNITED STATES DISTRICT COURT
D. OREGON.

No. CIV. 97-6309-TC.

CASEY MARTIN,
Plaintiff,

v.

PGA TOUR INC., a Maryland corporation,
Defendant.

Jan. 30, 1998.

ORDER

COFFIN, United States Magistrate Judge:

Plaintiff brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. On January 26, 1998, the court heard oral arguments on defendant PGA TOUR's motion (# 20) for summary judgment and plaintiff Casey Martin's cross-motion (# 44) for partial summary judgment. After argument, the court made oral findings and rulings, denying the Tour's motion in part and granting Martin's motion in part. This written order supplements and elaborates on the oral findings.

BACKGROUND

The PGA Tour is a non-profit association of professional golfers. The PGA sponsors and cosponsors professional golf events on three tours: the regular PGA Tour, with approximately 200 players at any given time; the Senior PGA Tour, with approximately 100 players; and the Nike Tour, with approximately 170 players.

There are various ways to gain playing privileges on the tours conducted by the PGA. Chief among them is a three-

stage qualifying school tournament. The first stage consists of 72 holes. Those who score well enough in this stage advance to the second stage consisting of 72 holes. The top qualifiers, approximately 168 players, advance to the third and final stage consisting of 108 holes. The lowest 35 finishers plus ties are awarded playing privileges on the regular PGA Tour. The next 70 lowest scoring players obtain privileges to play on the Nike Tour. A player failing to qualify for the regular PGA Tour, but qualifying for the Nike Tour may obtain the privilege to play on the PGA Tour by winning three Nike Tour tournaments during a single season or by finishing in the top fifteen places on the Nike Tour money list.

To enter the qualifying school tournament, a prospective player must pay a $3,000 fee and submit two letters of reference. Plaintiff in this case entered the qualifying school tournament and made it through the first and second stages.

In the first two stages of the qualifying tournament, players are permitted to use golf carts. In the third stage, as well as on the regular PGA Tour and the Nike Tour, players are required to walk and are required to use caddies.[1] Plaintiff contends he suffers from a debilitating disease known as Klippel-Trenaunay-Weber Syndrome, and for purposes of this motion the Tour does not contest this assertion. Klippel-Trenaunay-Weber Syndrome is a venous malformation which curtails blood circulation in plaintiff's right leg. This condition has resulted in significant atrophy in the lower leg and bone deterioration of the tibia. Plaintiff further contends that his physical impairment substantially limits his ability to walk. Plaintiff filed this action, pursuant to the ADA, seeking to enjoin defendant's "no cart" rule during the third stage of the qualifying school tournament, and on the PGA and Nike

[1]Golf carts are permitted on the Senior PGA Tour which involves golfers 50 years and older.

Tours. Plaintiff asserts that by failing to provide him with a cart, defendant fails to make its tournaments accessible to individuals with disabilities in violation of the ADA.

This court granted a preliminary injunction directing defendant to allow plaintiff to use a cart during the third stage of the qualifying school tournament. Defendant then lifted the no cart rule for all players during the third stage of the qualifying school tournament. Plaintiff scored well enough in the tournament to attain playing privileges on the Nike Tour. This court extended the injunction by stipulation of both parties to include the first two tournaments on the Nike Tour. Defendant now moves for summary judgment contending that the ADA does not apply to it or its tournaments.

STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552- 53, 91 L.Ed.2d 265 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case

with respect to which she has the burden of proof. *Id.* at 323, 106 S.Ct. at 2552. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir.1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir.1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Life Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir.1981).

DISCUSSION

Plaintiff alleges in his first claim for relief that defendant is a private entity which is or operates a place of public accommodation. As a result, plaintiff contends that defendant is subject to the ADA's prohibition of discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. *See* 42 U.S.C. § 12182. Plaintiff alleges in his second claim that defendant is a private entity that offers examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes. Plaintiff thus contends that defendant is subject to the ADA's requirement that any person offering examinations or courses related to applications, licensing, certification, or credentialing for professional or trade

purposes shall do so in a place and manner accessible to persons with disabilities. *See* 42 U.S.C. § 12189. Plaintiff alleges in his third claim that defendant is an employer as defined in the ADA. *See* 42 U.S.C. § 12111(5). Thus, plaintiff contends that defendant is prohibited from discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Defendant PGA Tour contends that it is entitled to summary judgment on all three of plaintiff's claims because it is a private non-profit establishment exempt from the ADA. *See* 42 U.S.C. § 12187.[2] Defendant argues, in the alternative, that even if it is not a private club it is entitled to summary judgment on counts one and two of plaintiff's complaint because the PGA and Nike Tour competitions do not constitute "places of public accommodation," and that the Nike Tour is not an examination or course. In addition, defendant argues that it is entitled to summary judgment in count three of plaintiff's complaint because plaintiff is not an "employee" of the PGA Tour.

A. Defendant is not Exempt from the ADA

As noted, a private club or establishment is exempt from coverage under Title III of the ADA (as well as Title II of the Civil Rights Act of 1964, which prohibits discrimination on the grounds of race, color religion, or national origin). Because of the importance of these laws, exemptions are

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[2] The exemption from coverage under the ADA found at 42 U.S.C. § 12187 applies to Title III of the ADA (public accommodations and services operated by private entities). With respect to Title I (prohibiting discrimination with regard to employment), an employer does not include a bona fide private membership club. *See* 42 U.S.C. § 12111(5)(B).

narrowly construed and the burden of proof rests on the party claiming the exemption. *See Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir.1968); *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-32 (5th Cir.1980).

Before one can answer the question of whether the PGA Tour is entitled to the private club exemption, one must first define the nature of the entity:

Succinctly put, the Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors.

The Tour, in short, is a commercial enterprise. The success of the Tour in generating revenue for its members is in direct proportion to public participation as spectators and viewers of the Tour's tournaments. Without this public participation, the primary objective of the Tour could not be achieved.

One of the principal cases relied upon by the PGA for its exemption claim actually cuts against its position:

In *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.1993), the court found that the Boy Scouts was indeed a private club notwithstanding its membership total of over five million scouts.[3] [FN3] The *Welsh* court focused keenly on the purpose of membership in the Scouts when it criticized the dissenter's emphasis on the size of the organization:

> The dissent concludes that because the Boy Scouts have five million members ... it is neither selective nor

[3]Although the Welsh case involved the Civil Rights Act, the ADA and the Civil Rights Act are interrelated in terms and application.

> private.... This conclusion not only exaggerates the facts, it ignores the purpose of the Scouts' existence and punishes the Boy Scouts for its success in recruiting future quality leaders of society. Certainly Congress did not intend to condition the private club exclusion from Title II on the popularity of the organization. *The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements.*

Id. at 1277. (emphasis added).

Regarding that purpose, the court had earlier observed:

> The purpose of Scouting ... is to equip youth of all races, colors and creeds to fulfill their duty to God, to mature personally, and to help others. This can only be achieved by a boy who believes in God. How does one who denies the very existence of a Supreme Being presuppose to follow the Oath of the Boy Scouts of America?

Id.

Just as the large membership in the Scouts did not deprive the organization of its private club status when its membership requirements were fitted with the purpose of the group, so the relatively small membership of the PGA Tour does not confer private status on this entity when its selectivity is counterbalanced with the Tour's purpose. Generating revenue for members scarcely seems to qualify as the type of protectable interest Congress had in mind when it excluded private clubs from coverage under the ADA and Civil Rights Act.

In *Quijano v. University Federal Credit Union*, 617 F.2d 129 (5th Cir.1980), the court ruled that the private membership club exception to the Civil Rights Act did not

apply to a federally chartered credit union, notwithstanding its non-profit status. In doing so the court observed:

> One rarely abandons the path of logic and common sense when Webster is consulted for the precise meaning of a term. In reference to the type of club suggested by section 701(b)(2) exemption Webster's Third International Dictionary of the English Language offers the following definition at page 430:
>
> > club: an association of persons for social and recreational purposes or for the common promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property.
>
> . . . .
>
> Credit unions, however useful they may be, exist for purely mercantile purposes and although they may be organized on a non-profit basis, member join credit unions in search of profits on their investments. Like . . . "auto clubs," credit unions are not clubs in any sense of the word.

Id. at 131, 133.

An analysis of the set of variables most commonly weighed by the courts in determining whether an organization is a bona fide private club mitigates against such a finding here. Those factors, as set forth in *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D.Pa.1989) are listed and discussed as follows:

1. Genuine Selectivity

The Tour contends that because only very few golfers possess the requisite skills to become members of the Tour and compete at its events, and because these golfers are

selected through competition at qualifying tournaments, its members are chosen through an exceptionally selective process and this factor weighs heavily in its favor.

Defendant's eligibility requirements, however, measure skills. They are not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption. *See Quijano*, 617 F.2d 129; *Welsh*, 993 F.2d 1267. *See also United States v. Jordan*, 302 F.Supp. 370, 376 (consideration is given to whether the organization has a civic, fraternal, or social purpose accomplished through membership screening). As with all sports, only the most skilled players achieve professional status. The pool of professional competitors will always be an extremely small percentage of those who participate in the sport at recreational or other non-professional levels, not to mention the general public. Such natural "weeding-out" selectivity is inherent to athletics, and does nothing to confer "privacy" to the organizations to which professionals matriculate.

2. Membership Control

Professional golfers who play in fifteen or more regular PGA Tour events in a year have voting rights.[4] But—which seems more to the point—new members are not voted in by the current members—they play their way in. *See Jordan*, 302 F.Supp. at 375 (consideration is given to whether the existing members have any control over the admission of applicants for membership). The membership control of the organization does little to make it or keep it "private."

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[4] The voting rights these golfers have is limited to voting for player directors from a slate of candidates chosen by the existing player directors. Only four members of the policy board, consisting of nine members, are player directors.

3. History of Organization

The organization has existed since 1968. It clearly was not formed to evade the Civil Rights Act or ADA. Of course, the fact that an organization is not a "sham" tells us it is "bona fide," but not that it is a "private club."

4. Use of Facilities by Nonmembers

Defendant contends that only its members participate as players in Tour Events. Plaintiff points to numerous nonmembers who participate in the tournaments as vendors, reporters, score keepers, volunteers, and members of the gallery.

The court finds this factor cuts against private club status. Of particular force is the heavy reliance by the Tour on public participation for the purpose of generating revenue for the tour. *See Smith v. YMCA*, 462 F.2d 634, 648 (5th Cir.1972) (a YMCA which enjoyed a substantial amount of revenue from the general public was not a private club); *Evans v. Laurel Links, Inc.*, 261 F.Supp. 474 (E.D.Va.1966) (a golf club which opened its lunch counter to the public, which restaurant generated $27,568 in revenue for the club, thereby subjected the entire golf course to the Civil Rights Act).

5. Club's Purpose

As discussed previously, the mercantile purpose of the PGA Tour weighs heavily against private club status.

6. Whether the Club advertises for Members

Courts have held that organizations which advertise and solicit new members do not fall within the private club exemption. *See Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir.1980).

The PGA Tour is extensively covered by the media. Its existence is well known to even the most casual golfers and followers of sports. The Tour has no more need or incentive

to advertise for golfers than do the Chicago Bulls for basketball players. The advertising factor carries little weight in the arena of professional sports.

7. Whether the Club is Nonprofit

The Tour is nonprofit, but yet its fundamental purpose is to enhance profits for its members. As in *Quijano*, the nonprofit status of a corporation that exists to further the commercial interests of its members does not weigh in favor of exempt status.

For the reasons stated, I reject the PGA Tour's argument that it is a private club and as such exempt from the ADA.

B. Defendant Operates a Place of Public Accommodation at the Golf Courses on which it Conducts its Tournaments

Defendant further contends that, if it is not found to be an exempt private club, the courses it operates are not open to the "general public" between the boundaries of play during its tournaments, and thus the tournament events are not "places of public accommodation."[5]

The term "public accommodation" is specifically defined to include the following places:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

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[5] Under the ADA, reasonable accommodations must be afforded the disabled using places of public accommodations.

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (emphasis added).

A golf course is specifically included on the list.

Defendant argues, however, that its courses are only places of public accommodation in those areas actually accessed by the public at large. It contends that since the public gallery is

not allowed inside the playing area, the fairways and greens of its golf courses are not places of public accommodation.

This argument is flawed.

First, if the PGA were correct, this renders the private club exemption virtually irrelevant to the issue of whether so-called private country clubs, for example, must comply with the ADA. Using the logic of the PGA, if the country club were found not to be a "bona fide private membership club" (as the term is discussed in the previous section), it could nonetheless refuse to accommodate any handicapped members by pointing out it only admits the country club's members (and not the public at large) on its grounds.

Second, the statute and regulations do not support the concept that places of public accommodation have zones of ADA application. PGA cites cases wherein private facilities do not lose their exempt status on the private portions of its facilities simply by operating a discrete public accommodation area (e.g., a private country club renting space to a private day care center open to nonmembers has ADA obligations only with respect to the day care center, according to DOJ regulations). But this is a far cry from the proposition that an operator of a place of public accommodation can create private enclaves within the facility of public accommodation and thus relegate the ADA to hop-scotch areas. May the day care center in the above example rope off a section for use only by the country club's members and be exempt from the ADA within those boundaries? I think not.

The PGA further cites, as an example of dual public/private zones of public accommodation places, the typical major league baseball stadium. The PGA argues that the bleachers are subject to the ADA because that is where the public is seated, but the dugout is not because the public is not allowed to mingle with the players therein.

What about a disabled manager of a team? May the St. Louis Cardinals refuse to construct a wheelchair ramp to the visitor's dugout to accommodate a disabled manager of the Chicago Cubs simply because spectators cannot go into the dugout?

In a somewhat similar case regarding the Rose Garden Arena, Magistrate Judge Donald Ashmanskas in finding that the executive suites in the arena, even though not open to the general public, are subject to the ADA stated:

> Many facilities that are classified as public accommodations are open only to specific invitees. For instance, a facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. *See* 42 U.S.C. § 12181(7). Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation. *See* 42 U.S.C. § 12181(7). A gymnasium or golf course may be open only to authorized members and their guests, but that does not necessarily preclude it from being classified as a place of public accommodation. Id. A private school may be open only to enrolled students, but it is still a place of public accommodation. *Id.*

Independent Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 758- 59 (D.Or.1997)

What the PGA also overlooks is that people other than its own Tour members are indeed allowed within the boundary lines of play during its tournaments. What if a member-golfer opted to hire a disabled caddy? Once the caddy steps within the boundaries of the playing area of the golf course—a statutorily defined place of public accommodation—does he step outside the boundaries of the ADA simply because the public at large cannot join him there? If this were the law,

how could such be reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodations?

Accordingly, I reject defendant's argument that the ADA does not apply to the areas of competition on the golf course during tournaments.

C. Issue of Employment and Whether the Nike Tour is a Course or Examination

Whether plaintiff is an employee of the Tour and whether the Nike Tour constitutes an examination or course within the meaning of the ADA are issues that I defer until the trial of the case.

CONCLUSION

For the reasons stated above, defendant's motion (# 20) for summary judgment is denied. Plaintiff's motion (# 44) for partial summary judgment is granted as to the issue of whether defendant is exempt from the ADA and whether defendant operates a place of public accommodation, and is otherwise denied.

STATUTORY APPENDIX

AMERICANS WITH DISABILITIES ACT

42 U.S.C. chapter 126

§ 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing

facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency" "commerce", and "industry affecting commerce" shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered

entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in

by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular

religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed

to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying

with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on- duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor- management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, conc ning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative

complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * * * *

SUBCHAPTER III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

§ 12181. Definitions

As used in this subchapter:

(1) Commerce

The term "commerce" means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities

The term "commercial facilities" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) Demand responsive system

The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term 'over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 431(e) of Title 45.

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or

accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph; the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making

such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility

It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by

individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service

If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system

For purposes of subsection (a) of this section, discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of

service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability

Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements

For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities,

discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator

Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or

the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

§ 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction

For purposes of subsection (a) of this section, discrimination includes—

(1) the imposition or application by a [FN1] entity described in subsection (a) of this section of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to—

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4)(A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public

transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Historical or antiquated cars

(1) Exception

To the extent that compliance with subsection (b)(2)(C) or (b)(7) of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970 [45 U.S.C.A § 431 et seq.], such compliance shall not be required.

(2) Definition

As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car—

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which—

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

§ 12185. Study

(a) Purposes

The Office of Technology Assessment shall undertake a study to determine—

(1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) Contents

The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 12184(b)(4) and 12186(a)(2) of this title, are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the- road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) Advisory committee

In conducting the study required by subsection (a) of this section, the Office of Technology Assessment shall establish an advisory committee, which shall consist of—

(1) members selected from among private operators and manufacturers of over- the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) Deadline

The study required by subsection (a) of this section, along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before

the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) Review

In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 792 of Title 29. The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

§ 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-

the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) Effective period

The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) Final requirement

(i) Review of study and interim requirements

The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to subparagraph (A).

(ii) Issuance

Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) Effective period

Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect—

(I) with respect to small providers of transportation (as defined by the Secretary), 3 years after the date of issuance of final regulations under clause (ii); and

(II) with respect to other providers of transportation, 2 years after the date of issuance of such final regulations.

(C) Limitation on requiring installation of accessible restrooms

The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) Standards

The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section,

and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars

If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

§ 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II

of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) [42 U.S.C.A. § 2000a et seq.] or to religious organizations or entities controlled by religious organizations, including places of worship.

§ 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section [FN1] 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is

appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

§ 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.